

**FISH AND GAME COMMISSION
REQUEST FOR RE-ADOPTION OF EMERGENCY
REGULATIONS**

Emergency Action to Re-adopt Section 749.3, Title 14, CCR,
Re: Special Order Relating to Incidental Take of Longfin Smelt
(*Spirinchus thaleichthys*) During Candidacy Period

Request for Re-adoption of Emergency Regulation:

The Fish and Game Commission ("Commission") requests to re-adopt Section 749.3, Title 14, California Code of Regulations ("CCR") [Office of Administrative Law (OAL) file number 2008-0220-02E] with minor modifications. The Findings of Emergency for this file containing the following information: Statement/Finding of Emergency; Authority and Reference Citations; Informative Digest; Fiscal Impact Statement; Standard Form 399, is hereby incorporated by reference. The objective of this regulation is to allow specified activities to continue on an interim basis, subject to the measures in the regulation designed to protect longfin smelt, while the Department of Fish and Game ("Department") focuses its efforts on further evaluating the status of longfin smelt.

Emergency Regulation in Effect to Date:

On February 7, 2008, the Commission accepted a petition to list longfin smelt as threatened or endangered under the California Endangered Species Act ("CESA"), thereby designating the longfin smelt a candidate species. On February 7, 2008, the Commission adopted an emergency regulation pursuant to Fish and Game Code ("FGC") Section 2084 to provide coverage for the take of longfin smelt during its candidacy period ("2084 regulation"). The 2084 regulation was approved by OAL and became effective on February 29, 2008. Pursuant to Government Code ("GC") sections 11346.1(e) and (h) emergency regulations are effective for 180 days. OAL may approve two re-adoptions, each for a period not to exceed 90 days. In the absence of re-adoption, the 2084 regulation will expire on August 26, 2008.

Statement of Emergency:

Pursuant to FGC sections 2080 and 2085, take of a candidate species is prohibited, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to FGC Section 2084; or (2) the Department authorizes the take through incidental take permits issued on a project-by-project basis pursuant to FGC section 2081. Therefore, in the absence of a 2084 regulation, individuals engaged in otherwise lawful research and monitoring, dredging and extraction of sand or gravel resources, or water diversion that may result in take of longfin smelt would have to obtain a permit from the Department in order avoid liability

and potential criminal violations of CESA for actions or activities that result in take of the candidate species.

The issuance of individual permits authorizing incidental take is a complicated, lengthy, and expensive process, and the Commission specifically finds that it is not feasible for the Department to issue incidental take permits on a project-by-project basis for the above-referenced activities that will otherwise be prohibited during the longfin smelt's candidacy period. The Department has determined that, with the measures outlined in the re-adopted 2084 regulation, the species will not become immediately at risk of extinction. For these reasons, re-adoption of the 2084 regulation is necessary to allow the continued export of water for agricultural, municipal and industrial use along with the other specified scientific and commercial activities. This regulation will ensure appropriate interim protections for longfin smelt within the area covered by the petition while the Department continues its 12-month review of the status of the candidate species.

Given that the emergency circumstances that necessitated the original 2084 regulation are continuing and unchanged, the Commission requests that the previous Finding of Emergency and Supplement to Statement of Emergency Action be used to supplement this justification.

Compliance with Re-adoption Criteria

(1) Same or Substantially Equivalent:

Pursuant to GC section 11346.1(h), the text of a re-adopted regulation must be the "same or substantially equivalent" to the text of the original emergency regulation. The proposed language for the re-adopted 2084 emergency regulation is substantially equivalent to the language of the original 2084 emergency regulation. The text of both regulations provide coverage for the take of longfin smelt subject to certain conditions for the following activities: research and monitoring, dredging and extraction of sand or gravel resources, local water diversions and operation of the State Water Project and Central Valley Project export facilities. Minor technical modifications have been made to the text of the original 2084 regulation to provide clarification.

Specifically, the following changes have been made to the text of Section 749.3, Title 14, CCR¹:

Language in section (a)(4)(B) was modified to insert a new deadline date reflecting the fact that the re-adopted regulation will expire on a different date.

Language in (a)(4)(E) was modified to reflect the fact that the re-adopted regulation will be in effect for "90 days" as opposed to 180 days.

¹ Revisions to the original text made to correct spelling errors or realize other minor technical edits will not be discussed.

(2) Substantial Progress:

GC section 11346.1(h) specifies that the emergency rulemaking agency must demonstrate that it is making “substantial progress and has proceeded with due diligence” to comply with the standard rulemaking provisions. The Commission has complied with this requirement by proceeding with due diligence to determine whether or not listing the longfin smelt as a threatened or endangered species is warranted. The Commission’s forthcoming final decision regarding the status of the longfin smelt obviates the need for permanent 2084 measures.

A 2084 regulation is an appropriate mechanism to authorize take for “candidate” species. Pursuant to FGC sections 2080 and 2085, take of a candidate species is prohibited, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to FGC section 2084 or (2) the Department authorizes the take through incidental take permits issued on a project-by-project basis pursuant to FGC section 2081. Therefore a 2084 regulation is an appropriate mechanism to authorize take of a candidate species. However, a species is only a “candidate” until the Commission decides whether listing the species as threatened or endangered “is warranted” or “is not warranted” (FGC section 2075.5). This determination immediately follows the conclusion of the 12-month review of the species’ status by the Department (FGC section 2074.6). Therefore, after the Commission makes the determination that listing the species is or is not warranted, a 2084 regulation is no longer necessary or appropriate² because the species is no longer a candidate for listing. At that point, the species is either protected under CESA by virtue of its listed status or is no longer protected under CESA because it is not listed and is no longer a candidate for listing.

If the Commission decides that listing the longfin smelt “is warranted,” the former candidate species then becomes a listed species and all the activities resulting in take of longfin smelt currently covered by the 2084 regulation will be required to obtain an Incidental Take Permit (ITP) pursuant to FGC section 2081 or otherwise obtain take coverage. ITP’s are authorized for certain activities if specified criteria are met, including minimization and full mitigation of the impacts of the take. ITP’s are issued on a project-by-project basis to ensure the mitigation and minimization measures are narrowly tailored to the individual project and completely protective of the species covered.

If the Commission decides that listing the longfin smelt “is not warranted,” take of the former candidate species would no longer be prohibited under CESA. Absent protected status, no mechanism, including a permanent regulation, would be needed to authorize take of longfin smelt.

² FGC section 2084 states: “The Commission may authorize, subject to terms and conditions it prescribes, the taking of any *candidate* species....” [emphasis added]

In summary, the Commission has complied with this requirement by diligently pursuing its determination of whether or not listing of longfin smelt is warranted. The inherent temporary nature of a 2084 regulation makes pursuing its permanent status unnecessary and contrary to statute. The Commission's final decision regarding the status of the longfin smelt will either mandate that certain take protections are afforded the species or obviate the need to obtain take coverage for the species.